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CAPTION.

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, ss.

Record of proceedings of the United States District Court within and for the Northern District of Ohio in the cause and matter hereinafter stated. Said action was commenced on the 25th day of November, 1949 and proceeded to final disposition on the 27th day of October 1950, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

Present: THE HONORABLE PAUL JONES,
United States District Judge.

In the Matter of the Petition of the CANADA STEAMSHIP LINES, LIMITED, for Exoneration from or Limitation of its Liability.	ADMIRALTY No. 3508.

SPECIAL APPEARANCE OF PARTIES NAMED HEREIN ON EXCEPTIONS TO THE JURISDICTION OVER THEIR PERSONS.

(Filed August 15, 1950.)

To the Honorable the Judges of the District Court of the United States for the Northern District of Ohio:

Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, appear specially herein for the sole purpose of filing their peremptory exceptions to the petition of Canada Steamship Lines, Ltd. and to the orders and monitions of this Court issued thereunder, dated November 30, 1949 and June 7 and June 8, 1950.

Said parties except to said petition and to said proceedings had hereunder in this cause under favor of Admiralty Rule 34 of this Court and upon the grounds hereinafter set forth.

In support of said exceptions, said parties respectfully allege as follows:

I.

They and each of them have valid claims for damages against Canada Steamship Lines, Ltd. arising from the loss and destruction of the Steamship Noronic by fire, at Toronto, Ontario, Canada, on September 17, 1949. As such claimants, they are among the persons mentioned in said petition of Canada Steamship Lines, Ltd., and in the orders and monitions issued by this Court in this cause above stated.

II.

They except to said petition and to the order and monition dated November 30, 1949, and to the proceedings had thereunder upon the ground that petitioner Canada Steamship Lines, Ltd. has failed to comply with the mandatory requirements of United States Admiralty Rule 51 as amended on June 21, 1948, in the following respects:

1. The said monition issued by the Court in this cause requires that notice of the proceeding be published once

each week until the return date of the said monition. Said parties say that the second publication of said notice was made on December 12, 1949, in the newspapers named in said monition. Petitioner did not theretofore nor on that day mail a copy of said notice to any of the persons or personal representatives herein named *although petitioner knew that said persons and each of them* had a claim against the vessel and the petitioner arising out of the voyage on which the claims sought by petitioner to be exonerated or limited arose. Nor did petitioner in respect to cases involving death, theretofore, nor on that day, mail a copy of said notice nor a copy of said Rule 52 as amended to the decedents at their respective last known places of address, nor to any of the persons known to the petitioner to have made a claim on account of such decedents, as required by said Rule 51.

2. Petitioner failed to give by publication due and lawful notice as required by said Rule 51, in that the purported notice published in said newspapers was not substantially in accordance with the form required by said Rule 51 in the following particulars:

(a) Said notice omitted in its caption the following: "Notice of petition for exoneration from or limitation of liability. Filed ....."

(b) Said notice failed to include the following requisite statement: "Pursuant to Title 46, U. S. Code, Sections 183-189, claiming the right to * * *"

(c) Said notice omitted the following: "* * * under oath as provided in United States Supreme Court, Admiralty Rule 52, with the Clerk of this Court at the U. S. Court House at Cleveland, Ohio."

(d) Said notice failed to give the following instruction: "* * * as required by Supreme Court Admiralty Rule 53 and serve on or mail to petitioner's proctors a copy."

3. Petitioner did not mail a copy of any notice to every person known by petitioner to have made a claim against the vessel or petitioner arising out of the voyage or trip on which the claims sought to be limited arose.

4. Petitioner did not, in cases involving death, send a copy of any notice together with a copy of Rule 52 by mail

to decedents at their respective last known addresses, nor did it send any notice by mail or otherwise to persons known to petitioner to have made claims on account of such deaths prior to June 28, 1950.

III.

They except to said petition and to the order and monition dated June 8, 1950, and the order contained in the Memorandum Opinion of June 7, 1950, and to the proceedings had thereunder upon the ground that petitioner Canada Steamship Lines, Ltd. has failed to comply with the mandatory requirements of United States Supreme Court Admiralty Rule 51 as amended on June 21, 1948, and has failed to comply with the directions of Title 46, Section 185, in the following respects:

1. They reallege all the reasons and grounds set forth in the exceptions raised to the order and monition dated November 30, 1949, in Subdivision II hereof.

2. The first monition expired April 3, 1950, and no application was made nor order entered prior to said expiration or for more than one month thereafter, keeping said writ and process of monition dated November 30, 1949, in force and effect.

3. At the time of the issuance of the monition and order of June 8, 1950, no jurisdiction over the persons of these exceptors had been had and they had neither been served personally nor had any legal notice been mailed to them nor had any copy of Rule 52 Admiralty Rules been mailed to any of them by Canada Steamship Lines, Ltd., and no valid process was in existence.

4. At the time of issuance of the order and monition of June 8, 1950, more than six months had elapsed since the first written notice of claim had been given to or filed with petitioner, Canada Steamship Lines, Ltd.

These exceptions are based upon the files and records of this Court and the affidavits hereto attached and by reference made a part hereof and the affidavits of Ethel Dahlke, V. E. Metzler, Cora D. Sheron, Marion E. Dexter, Elmer H. Groefsema, Lucille Orth, Madge Bishop, Pearle T. Coleman, Eleanor A. Handloser, Pearl Oakes, C. Audley Gray, Verena Gray, and Charles Haas.

WHEREFORE, said parties, appearing specially as aforesaid, jointly and severally pray for the following relief for themselves:

1. That their said exceptions be sustained by the Court.

2. That the petition for exoneration or to limit liability be dismissed as to them at petitioner's costs.

3. That the order and monition of this court dated November 30, 1949, be held to be void and of no effect as to them.

4. That the order and monition of this court dated June 7 and June 8, 1950, be held to be void and of no effect as to them.

5. That all attempted service of process by publication be held to be void and of no effect as to them.

6. That all attempted service of process by mail be held to be void and of no effect as to them.

J. D. GUERNSEY,

Proctor for Excepting Claimants Howard H. Timanus, Administrator of the Estate of James K. Timanus, deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, deceased,

Fostoria, Ohio,

and

KENNETH C. DAVIES,
W. ALEXANDER ELDRIDGE,
ELMER H. GROEFSEMA,
VICTOR M. TODIA,
J. HAROLD TRAVERSE,

738 Union Commerce Building,
Cleveland 14, Ohio,
MAin 1-1859,

Proctors for Excepting Claimants.

(Brief omitted.)

AFFIDAVIT OF HOWARD H. TIMANUS, ADMINISTRATOR OF THE ESTATES OF JAMES K. TIMANUS AND DOROTHY COLEMAN TIMANUS.

STATE OF OHIO,
SENECA COUNTY, SS.

Howard H. Timanus, being first duly sworn, says and avers that he is the duly appointed, qualified and acting administrator of the estate of James K. Timanus and the administrator of the estate of Dorothy Coleman Timanus, having been appointed as such by the Probate Court of Seneca County, Ohio, on the 5th day of October, 1949.

That James K. Timanus and Dorothy Coleman Timanus, his wife, were on the 17th day of September, 1949, and for a long time prior thereto, were residents of the City of Fostoria, Seneca County, Ohio, and that their mailing address was 1044 North Union Street, Fostoria, Ohio.

That from and after the 17th day of September, 1949, and until the date of this affidavit, the deponent took charge of the receipt of all mail addressed to either James K. Timanus or Dorothy Coleman Timanus, or both, at their residence above stated.

That James K. Timanus and Dorothy Coleman Timanus were both passengers on the vessel Noronic at the time of its destruction by fire at the Port of Toronto, Ontario, Canada, on the 17th day of September, 1949, and that both James K. Timanus and Dorothy Coleman Timanus perished on said vessel as a consequence of the fire.

Affiant believes and therefore alleges the fact to be that at the time shortly prior to said disaster, said James K. Timanus and Dorothy Coleman Timanus became passengers aboard said vessel, they furnished their names and address to the Canada Steamship Lines Limited, said address being 2238 Carabel Avenue, Lakewood, Ohio, where said James K. Timanus and Dorothy Coleman Timanus, temporarily resided by reason of Dr. James K. Timanus internship in a Cleveland Hospital, that affiant since the 17th day of September, 1949, took charge of the receipt of all mail addressed to either James K. Timanus or Dorothy Coleman at said Cleveland address.

Affiant believes and therefore alleges the fact to be that on the 17th day of September, 1949, and that at all

times subsequent thereto, the Canada Steamship Lines, Limited was in possession of the passenger list containing the names and addresses of the passengers aboard said vessel Noronic at the time of said disaster, and that the name of James K. Timanus and Dorothy Coleman Timanus and their address at number 2238 Carabel Avenue, Lakewood, Ohio, were on said passenger list.

Affiant further says that at no time since said disaster on the 17th day of September, 1949, until the 28th day of June, 1950, did the petitioner, Canada Steamship Lines, Limited, mail any notice to either James K. Timanus or Dorothy Coleman Timanus nor to deponent of the filing of the petition for exoneration from or limitation of liability in this cause; that at no time since the 17th of September, 1949, until the 28th day of June, 1950, was a copy of Rule 52 of the United States Supreme Court Admiralty Rules of Practice mailed to either James K. Timanus, Dorothy Coleman Timanus or deponent, although petitioner knew that a claim on account of the death of the said James K. Timanus and Dorothy Coleman Timanus existed and had arisen by reason of the said fire on said vessel and that no such notice or rule was mailed by said Canada Steamship Lines, Limited, to either James K. Timanus or Dorothy Coleman Timanus, at either address hereinabove set forth, until after June 28th, 1950.

Affiant further says that he believes and therefore alleges the fact to be that on the 21st day of September, 1949, Canada Steamship Lines, Limited, owners of said vessel, received a written notice of claim from C. Audley Gray and Verena Gray, for personal injuries sustained by said persons, both of whom were passengers on said vessel at the time of said disaster on the 17th day of September, 1949, and had claims by reason thereof against the Canada Steamship Lines Limited, as appears by the affidavit of said parties heretofore filed in this cause.

And further deponent saith not.

HOWARD H. TIMANUS.

(Jurat omitted.)

ORDER OVERRULING EXCEPTIONS.

(Entered October 27, 1950 by Paul Jones, Judge.)

Upon consideration of exceptions filed on August 15, 1950, by prospective claimants appearing specially herein, it is hereby

ORDERED that the same be and they are hereby overruled with exceptions to said objecting prospective claimants.

JONES,
U. S. District Judge.

Dated 10/27/50

PROSPECTIVE CLAIMANTS' SPECIAL APPEARANCE AND NOTICE OF APPEAL.

(Filed November 14, 1950.)

Please take notice that Howard H. Timanus, administrator of the Estate of James K. Timanus, deceased, and Howard H. Timanus, administrator of the estate of Dorothy Coleman Timanus, deceased, appearing specially herein for the purpose of this appeal and for no other purpose, hereby appeal to the United States Court of Appeals for the Sixth Circuit from each and every Finding of Fact and Conclusion of Law included in the following:

(a) Memorandum Opinion of the Court filed June 7, 1950;

(b) Order of the Court filed June 8, 1950, on exceptions of prospective claimants appearing specially herein;

(c) Order of the Court for second monition and injunction filed June 8, 1950;

(d) Order of the Court filed October 27, 1950, overruling exceptions of prospective claimants appearing specially.

Said prospective claimants submit herewith a copy of their petition for appeal and assignment of errors.

GUERNSEY & GUERNSEY,
Proctors and Attorneys for Claimants.

R. C. GUERNSEY,
Of Counsel.

J. D. GUERNSEY,
Of Counsel.

PETITION FOR APPEAL IN BEHALF OF PROSPECTIVE CLAIMANTS APPEARING SPECIALLY.

(Filed November 14, 1950.)

Now come the prospective claimants appearing specially herein as set forth in the Notice of Appeal, by R. C. Guernsey and J. D. Guernsey, their Proctors, and feeling themselves aggrieved by the Orders of this Court entered in the above entitled proceeding on the 7th, and 8th days of June, 1950, and on the 27th of October, 1950, do hereby claim an appeal to the United States Court of Appeals for the Sixth Circuit, from said Orders and from each and every part thereof.

Said prospective claimants appearing specially herein present herewith their assignment of errors and respectfully pray that said appeal may be allowed; that this cause may be certified to the United States Court of Appeals for the Sixth Circuit; that this Court will fix the amount of the appeal bond therefor and will allow for the making up and completion of the record in said cause within forty (40) days from the allowance of this appeal, or such further time as may become necessary.

HOWARD H. TIMANUS,
Administrator of the Estate of James K. Timanus, Deceased.

HOWARD H. TIMANUS,
Administrator of the Estate of Dorothy Coleman Timanus, Deceased.

Notice of Citation of Appeal waived.

LUCIAN Y. RAY,
One of Proctors for Petitioners.

GUERNSEY & GUERNSEY,
Proctors and Attorneys for Appealing Claimant.

R. C. GUERNSEY,
Of Counsel.

J. D. GUERNSEY,
Of Counsel.

Dated November 13th, 1950.

ASSIGNMENT OF ERRORS IN BEHALF OF PROSPECTIVE CLAIMANTS APPEARING SPECIALLY HEREIN.

(Filed November 14, 1950.)

Now come Howard H. Timanus, administrator of the Estate of James K. Timanus, deceased, and Howard H. Timanus, administrator of the Estate of Dorothy Coleman Timanus, deceased, prospective claimants appearing specially herein, by R. C. Guernsey, and J. D. Guernsey, their Proctors, and hereby assign error to the orders of this Court filed on the 7th and 8th days of June, 1950 and the 27th day of October, 1950, including the Findings of Fact and Conclusions of Law contained therein, and to all proceedings theretofore had, in the following particulars:

(1) That the Court erred in holding that the mere filing of the petition and bond within the six month period provided for by 46 U. S. C., Sec. 185, following the receipt of the first written notice of claim, gave the Court jurisdiction, without any process whatever, not only of the res, but over the persons of prospective claimants, to fully determine their rights as against Canada Steamship Lines, Limited, and to finally enjoin them from bringing suits in forums of their own choice with a right of trial by jury and in holding that the inchoate jurisdiction over the persons of prospective claimants was not defeated by the admitted failure to comply with the requirements of U. S. Supreme Court Admiralty Rule 51.

(2) That the Court erred in granting on June 7th, 1950 and on June 8, 1950, petitioner's oral application of May 15th, 1950, for a second monition and order of publication and authority to mail notices, predicated upon a petition for limitation of liability in a forum concursus filed on November 25th, 1949, where the six months period provided for by 46 U. S. C. Sec. 185, during which limitation of liability proceedings could be brought in a forum concursus expired March 19, 1950, and where the return date on the original monition expired April 3rd, 1950, and it further erred in holding that jurisdiction over the persons of the excepting prospective claimants could be acquired by such second monition, publication and notice thereof.

(3) That the Court erred in holding that Admiralty Rule 51 could be complied with by the issuance of a second

monition, publication and mailing eight months after the petition and bond had been filed, notwithstanding the requirements of Admiralty Rule 51, which expressly provides that:

> "*Upon* the filing (of the bond) * * * the Court *shall* issue a monition, * * *
>
> "Notice of the monition *shall* be published * * * once in each week for four successive weeks *before the return date of the monition.*
>
> "The petitioner *not later than the day of second publication* (in this case, December 12, 1949) *shall* also mail a copy of the above notice to every person known to have made any claim against the vessel or the petitioner * * *." (Emphasis supplied.)

and notwithstanding that there is no provision, either by Statute or Admiralty Rule, authorizing the issuance of a second monition, publication and mailing.

(4) That the Court erred in holding that petitioner's failure to comply with Admiralty Rule 51 was a mere procedural irregularity, subject to correction, after the expiration of the six month period prescribed in 46 U. S. C. Sec. 185, when the Court should have held that such failure was fatal to the Court's acquisition of jurisdiction over the persons of the excepting prospective claimants.

(5) That the Court erred in holding that jurisdiction of the persons of the excepting prospective claimants could be acquired without personal service of process or without constructive service of process as prescribed in Supreme Court Admiralty Rule 51.

(6) That the Court erred in holding that admiralty jurisdiction in limitation of liability proceedings, where relief in personam is sought against prospective claimants, including injunctive relief and the final determination of their claims, is not analogous to the Court's jurisdiction over the person in civil actions and that the notice to be published of the issuance of the monition and the mailing of copies was not service of process in the civil sense, whereas the Court should have held that such service was constructive service of process in the civil sense, there being no other method provided by law for service of process in limitation of liability proceedings.

(7) That the Court erred in holding that the notice to be published and mailed of the issuance of the monition was merely a warning to all potential claimants of the pendency and conclusive character of the proceeding, whereas such publication and mailing, being constructive service, was essential to the compliance with the constitutional requirements of due process of law.

(8) That the Court erred in holding that compliance with U. S. Supreme Court Admiralty Rule 51 is only a condition precedent to the right of the petitioner to contest liability, whereas the Court should have held that such compliance is also a condition precedent to the right to limit liability.

(9) That the Court erred in holding that Supreme Court Admiralty Rule 53 provides that corrective steps in an attempt to acquire jurisdiction over the persons of prospective claimants may be taken after the six month period has expired even if at first the petitioner has not followed the requirements of Admiralty Rule 51, whereas the Court should have held that immediate compliance with Admiralty Rule 51 upon the filing of the petition and bond is a condition precedent to both the right to limit liability and the right to contest liability.

(10) That the Court erred in following the ruling in the case of "*The Chickee,*" D. C. W. D. Penna. (February 7, 1941, Schoonmaker, *D. J.*), 29 F. Supp. 200, whereas the same Court in the same case, as reported in 54 F. Supp. 19 (July 10, 1942) and whereas the U. S. Court of Appeals for the Third Circuit, also in the same case, as reported in 141 F. (2d) 80 (February 8, 1944) held that that petition to limit liability "had no legally operative effect" * * * "and we may dismiss it from further consideration."

(11) That the Court erred in holding that the issuance of a new monition, after the expiration of the six month period, was not the commencement of a new limitation action.

(12) That the Court erred in issuing the orders of June 7, 1950 and of June 8, 1950, in which it denied the exceptions of objecting prospective claimants, whereas it should have sustained said exceptions, dissolved the injunction and dismissed the petition filed November 25th, 1949.

(13) That the Court erred on June 7, 1950 and on June 8, 1950, in ordering the issuance of a new monition and thereafter in issuing such new monition returnable August 15, 1950,—the six month period having expired on March 19, 1950, and the return date on the original defective monition having expired on April 3, 1950.

(14) That the Court erred in ordering that public notice of said new monition be given by publication in the several newspapers mentioned in the order of June 8, 1950, —the six month period having expired on March 19, 1950.

(15) That the Court erred in ordering that a copy of said public notice as so published be mailed to prospective claimants as set forth in the order of June 8, 1950,—the six month period having expired on March 19, 1950.

(16) That the Court erred in ordering that where deaths were involved, a copy of said public notice and a copy of Supreme Court Admiralty Rule 51 be mailed to decedents at their last known addresses and also to any persons who shall be known to have made any claim on account of such deaths, as set forth in said order of June 8, 1950,—the six month period having expired on March 19, 1950.

(17) That the Court erred in its order of June 8, 1950, in directing that the injunction entered on November 30, 1949, enjoining the further prosecution of or institution or prosecution of any further proceedings in any Court, or the taking of any legal action whatever in any other proceedings for any loss, damage or injury done or occasioned by or in consequence of the Noronic disaster, be continued in full force and effect, whereas the Court should have held that the injunction of November 30, 1949 was void and of no effect, the six month period having expired and the Court should have held that it was without jurisdiction on June 8, 1950 to have entered any injunction whatsoever against prospective claimants.

(18) That the Court erred in overruling the exceptions filed by prospective claimants on special appearance on June 14, 1950, by the order filed June 19, 1950.

(19) That the Court erred in holding the word "provided" in Rule 53, Admiralty Rules, means "unless and until" and in ruling that Rule 53 authorizes the Court to issue a new monition and to authorize publication and

mailing of notice to be done at any time prior to a ruling on the merits of the limitation petition.

(20) That the Court erred in finding that the notice of monition as originally published was in substantial compliance with the form prescribed in Admiralty Rule 51.

(21) That the Court erred in overruling the exceptions filed by prospective claimants on special appearance on October 27, 1950.

Prospective claimants appearing specially herein on exceptions reserve the right to urge such further errors as may appear at the hearing on this appeal.

GUERNSEY & GUERNSEY,
Proctors and Attorneys for Claimants.

R. C. GUERNSEY,
Of Counsel.

J. D. GUERNSEY,
Of Counsel.

Dated November 13, 1950.

ALLOWANCE OF APPEAL.

(Entered November 15, 1950 by Paul Jones, Judge.)

The petition of Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, prospective claimants appearing specially in the above entitled proceeding praying for the allowance of an appeal to the United States Court of Appeals for the Sixth Circuit, having been filed herein, and it further appearing that said prospective claimants have filed their assignment of errors herein as required by the Admiralty Rules promulgated by the United States Supreme Court, and it further appearing that the petitioner, by its proctors, has waived issuance and service of a citation and has entered an appearance in said proceeding on appeal;

Now, on application of R. C. Guernsey and J. D. Guernsey, proctors for said prospective claimants appearing specially herein, it is hereby

ORDERED, that such appeal be and the same is hereby allowed as prayed for; and it is further hereby

ORDERED that the amount of the bond for costs to be given by the said Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, prospective claimants appearing specially herein on appeal, is hereby fixed in the sum of Two Hundred and Fifty Dollars ($250.00), subject to the further order of this Court on cause shown for increasing the amount of said security for costs; and it is further

ORDERED that within forty (40) days from the date hereof or such extension thereof as may be granted by this Court, the transcript of the record herein be transmitted to the United States Court of Appeals for the Sixth Circuit.

JONES,
United States District Judge.

Dated:
November 15, 1950.

BOND ON APPEAL IN BEHALF OF PROSPECTIVE CLAIMANTS APPEARING SPECIALLY.

(Filed November 14, 1950.)

KNOW ALL MEN BY THESE PRESENTS that Howard H. Timanus, Administrator of the Estate of James K. Timanus, deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, deceased, prospective claimants appearing specially herein, as principal, and New Amsterdam Casualty Company, a corporation organized and existing under the laws of the State of New York, and authorized to do business in the Northern District of Ohio, as surety, are held and firmly bound unto the Canada Steamship Lines, Limited, petitioner, in the sum of Two Hundred and Fifty Dollars ($250.00), the payment of which well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Signed with our respective seals and dated this 14th day of November, 1950.

The condition of the above obligation is such that whereas the said Howard H. Timanus, *et al.*, prospective claimants appearing specially in the above entitled proceeding, have appealed to the United States Court of Appeals for the Sixth Circuit from certain orders of the United States District Court for the Northern District of Ohio, filed on the 7th and 8th days of June, 1950, and on the 27th day of October, 1950, in a proceeding for limitation of liability, wherein said Canada Steamship Lines, Limited, is petitioner.

Now, Therefore, the condition of this obligation is such that if the above named Howard H. Timanus, *et al.*, prospective claimants appearing specially herein, shall prosecute their appeal to effect and shall answer all damages and costs which may be decreed against them, including costs on appeal, in the event the said Howard H. Timanus, *et al.*, appearing specially, fail to make good their appeal, then the above obligation shall be void, otherwise to remain in full force and effect.

HOWARD H. TIMANUS,
Administrator of the Estate of James K. Timanus, Deceased.

HOWARD H. TIMANUS,
Administrator of the Estate of Dorothy Coleman Timanus, Deceased.

In the Presence of:
Augusta Knox,
J. D. Guernsey.

NEW AMSTERDAM CASUALTY COMPANY,
By STANLEY B. MELLOR,
Attorney-in-fact.
(Seal)

In the Presence of:
Grace Ann Pitznick,
I. Shepard.

The within bond is hereby approved as to form and amount this ..... of November, 1950.

United States District Court

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL.

(Filed November 18, 1950.)

Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, prospective claimants, appearing specially herein, and Canada Steamship Lines, Limited, petitioner, by their respective proctors, hereby agree and stipulate that, for the purpose of appeal, the record on appeal in the above entitled proceeding shall include the following:

(1) Entry of special appearance and exceptions in behalf of Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, prospective claimants.

(2) Order of the Court overruling said prospective claimants' special appearance on exceptions, filed October 27, 1950.

(3) Notice of appeal filed November 14, 1950.

(4) Petition for allowance of appeal, filed November 14, 1950.

(5) Assignment of errors, filed November 14, 1950.

(6) Allowance of appeal, filed November 15, 1950.

(7) Bond on appeal, filed November 15, 1950.

(8) Admission of service of notice of appeal, petition for appeal, assignment of errors, waiver of citation and entry of appearance.

(9) The record on appeal now pending in the United States Court of Appeals for the Sixth Circuit, under Case No. 11217 on the docket of said Court, entitled Robert Adamson *et al.*, Appellants, vs. Canada Steamship Lines, Limited, Appellee, without the same being reprinted and refiled herein.

(10) Stipulation as to contents of record on appeal.

(11) Stipulation re certification of record on appeal.

(12) Certificate of Clerk.

GUERNSEY & GUERNSEY,
By J. D. GUERNSEY,

Proctors for Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, Prospective Claimants appearing specially herein.

LECKIE, MCCREARY, SCHLITZ & HINSLEA,
By LUCIAN Y. RAY,

Proctors for Petitioner.

It is requested that the Clerk deliver all of the foregoing items, with the exceptions of those mentioned as constituting the record on appeal in said Case No. 11217, to The Gates Legal Publishing Company at Cleveland, Ohio, for printing.

STIPULATION RE CERTIFICATION OF RECORD ON APPEAL.

(Filed November 18, 1950.)

It is hereby stipulated by and between the proctors for the respective parties hereto that the record as presented to the Clerk by the printer may be certified by the Clerk, as required by law and the rules of the United States Court of Appeals for the Sixth Circuit, as a true, complete and full copy of the original petition for exoneration from or limitation of liability, papers and orders involved in this proceeding, as set forth in the stipulation as to the contents of record on appeal, without further comparison by the Clerk and without waiver of petitioner's right to make application for dismissal of appeal.

GUERNSEY & GUERNSEY,
By J. D. GUERNSEY,

Proctors for Howard H. Timanus, Administrator of the Estate of James K. Timanus, Deceased, and Howard H. Timanus, Administrator of the Estate of Dorothy Coleman Timanus, Deceased, Prospective Claimants appearing specially herein.

LECKIE, MCCREARY, SCHLITZ & HINSLEA,
By LUCIAN Y. RAY,

Proctors for Petitioner.

CERTIFICATE OF CLERK.

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, ss.

I, C. B. Watkins, Clerk of the United States District Court within and for said District, hereby certify that the foregoing printed pages contain a true copy of the original pleadings, papers and judgment in accordance with the designation of contents of record on appeal and as required by Civil Rule 75 (g), the originals of which remain in my custody as clerk of said court.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said District, this ..... day of November, A. D. 1950.

C. B. WATKINS, *Clerk,*
By K. V. WILSON,
Chief Deputy.

(Seal)

PROCEEDINGS IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(November 29, 1950—Before: HICKS, Chief Judge; and MARTIN and MCALLISTER, Circuit Judges.

These causes were argued by Elmer H. Groefsema and J. Harold Traverse for Robert Adamson, et al., by J. D. Guernsey for Harold H. Timanus, Admr. et al., and by Lucian Y. Ray for Canada Steamship Lines, Ltd., and are submitted to the Court.

JUDGMENT

(Entered December 14, 1950)

The above causes coming on to be heard upon the transcript of the record, the briefs of the parties, and the arguments of counsel, and the court being duly advised,

Now, therefore, it is ordered, adjudged, and decreed that the orders of the district court overruling the exceptions to the jurisdiction of the district court, from which the above appeals were taken, be and are hereby affirmed, in accordance with the opinion of the district court.

PETITION FOR REHEARING

(Filed January 3, 1951)

Appellants hereby petition the Court for a rehearing in this matter for the following reasons:

1. The Court has adopted the opinion of the lower court published in 1950 American Marine Cases, 1499, and which opinion states that:

> "In the *Chickee,* 39 F. Supp. 200, the petitioner failed to cause a monition to issue or to have a commissioner appointed before the six months had elapsed. Nevertheless, it was held that petitioner could still proceed in accordance with the statute" (R. 48).

Whereas the same court in the same case, as reported in the *Chickee,* 54 F. Supp. 19, July 10, 1942, and whereas the United States Court of Appeals for the Third Circuit, also in the same case, as reported in 141 F. 2d, 80, February 8, 1944, reversed this earlier decision and held that the petition to limit liability:

> "had no legally operative effect • • • and we may dismiss it from further consideration."

This same point now urged was urged by appellants in their main brief (page 20 *et seq.,* and page 43). Appellees in no way disputed that the opinion relied upon by the District Court was overruled and indeed neither mentioned nor discussed this error in the lower court's opinion.

It would seem that this Court would not knowingly rely upon a District Court opinion which had been reversed by the Court of Appeals for the Third Circuit.

2. The Court has adopted the opinion of the lower court, which opinion holds that a vessel owner may have a monition issued and notices published and mailed at a time selected by itself, which is different from that required by Admiralty Rule 51, and which time is in no way limited or restricted by the six month statutory limitation

period of Title 46, Section 185, U. S. C., and further holds that a vessel owner may do this solely as a matter of right and that the court shall permit it even without any cause being shown. Yet United States Supreme Court Admiralty Rule 51 expressly provides that the *return date* on the *writ of monition* can be enlarged *only upon cause being shown.* The rule provides:

> "The court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, *which time the court, for cause shown, may enlarge.*"

It seems an anomalous ruling that a new writ may issue without cause shown, after the six month statutory limitation period has expired, while the return date on the writ can be extended only with cause.

The District Court opinion has been published in American Marine Cases which is closely followed by admiralty lawyers all over the country. This Court's approval of the District Court opinion will be taken as authorizing a vessel owner to give notice to claimants at any time it shall choose.

3. The Court has adopted the opinion of the lower court, which opinion erroneously holds that Rule 53, Admiralty Rules, provides that constructive steps may be taken if the petitioner fails to comply with Rule 51 in publishing and mailing notices at the times required therein.

The only purpose of Rule 53 as far as it concerns the vessel owner, is to provide a means by which the vessel owner may be at liberty in a limitation of liability proceeding also to put in issue his claim to complete exoneration. That is, he is given the liberty to contest his liability

or the liability of his vessel, (i. e. exoneration) in a limitation proceeding, provided he has met all the requirements of Rule 51, and provided he shall have stated the facts and circumstances by reason of which exoneration is claimed and have given a bond for costs, in addition, of course, to the limitation of liability bond.

Except for Rule 53, the vessel owner could not by virtue of any statute or other rule present the issue of exoneration in the limitation of liability proceeding. This follows because Sections 183-185, of Title 46 U. S. C., deal only with limitation of liability in a forum concursus and say nothing about exoneration from liability and Rule 51 deals exclusively with limitation of liability and does not deal with exoneration, except that in the proposed notice, provision is made for both limitation and exoneration, anticipating that petitioner will, of course, want to invoke Rule 53 at the commencement of limitation proceedings.

The words in Rule 53 "the petitioner shall be at liberty to contest his liability or the liability of said vessel" mean to seek exoneration, complete relief. That phrase has nothing to do with and does not mean contesting right to "limitation of liability" which affords only a partial relief.

The opinion likewise errs in construing the word "provided" in Rule 53 to mean "until". Thus the opinion states:

> "The failure to carry out the requirements of Rule 51 only stays the contest as to liability. See Rule 53, which demonstrates what I believe to be the proper result. It is there stated that the owner shall be at liberty to contest his liability provided he has complied with the requirements of Rule 51. This clearly provides that if he had not complied with that Rule, the monition is ineffective and the limitation proceeding will be stayed *until* a new monition is issued and the notice requirements met (R. 46).

Proceedings to contest limitation only may not go forward *until and unless* Rule 51 is complied with. See again Rule 53" (R. 48).

The District Court has thus injected a time element into Rule 53 when none exists:

Appellants are unable to understand how the court or appellee could place such a meaning on the word provided, particularly when it is used in said Rule in the past perfect tense, "provided he shall have complied with the requirements of Rule 51."

4. The Court has adopted the opinion of the lower court, which opinion erroneously holds that the monition, notice of which is required by United States Supreme Court Admiralty Rule 51 to be published and copies of which notice are required to be served by mail on prospective claimants, is not analogous to process.

Yet such published and mailed notices is admittedly the method by which claimants are brought into the limitation of liability proceeding.

In this respect the lower court opinion says:

> "Jurisdiction does not depend upon personal or constructive service. The notice required by issuance of monition is not service of process in the civil sense * * *." (R. 44.)
>
> "admiralty jurisdiction is not analogous to that in civil actions where jurisdiction is contingent upon valid service of process on the person sued" (R. 48).

The opinion then goes on to define the purpose of the notices—published and mailed—in terms which are identical with the definition of process, saying:

> "it is what the word means,—actual or constructive notice or warning to all potential claimants of the pendency and conclusive character of the proceeding" (R. 44).

See the definitions of process in admiralty, appellants' main brief pp. 9, 10 and appellee's brief, page 47.

Moreover, Rule 51, itself, labels the monition as a writ. It provides in part:

> "The court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said *writ*."

Appellee has conceded that the published and mailed notices of the writ of monition must be served in strict compliance with the method specified in Rule 51 in order that any final decree may be entered against prospective claimants, (Appellee's brief pp. 44, 45.)

This admission is demanded by reason of the decision of the United States Supreme Court in *Mullane* v. *Bank*, 339 U. S. 306, 1950. The function of the mailed notices in the instant proceeding is identical with that of the mailed notices required by *Mullane* v. *Bank*. The Court in that case held that the notice was process and was essential to the jurisdiction of the Court. The opinion in the instant proceeding, holding that the notices are not process, is in this respect in direct conflict with that of the United States Supreme Court.

5. The court has adopted the opinion of the lower court, and that opinion erroneously holds that there is no:

> "limitation period within which the monition and notice of monition or notice to claimants had to issue" (R. 48).

This is erroneous for there are specific time limits in Rule 51. The rule says that the monition shall issue "upon" the filing of the security. Appellants cited (page 29, 30 main brief) several decisions construing the word "upon" and dictionary definitions of the same word. None of the constructions could be stretched to make "upon" mean eight months thereafter, which is the ef-

fect of the Court's decision in the instant case. Appellees in their brief cited no authority on this point and indeed made no response to this argument of appellants. Appellee never claimed there were no time requirements in Rule 51. Appellee's position was rather that although the time requirements of Rule 51 were not met, subsequent compliance at any time before a final decree was sufficient to give the court jurisdiction. (A final decree in some jurisdictions, such as New York would be more than four years after the filing of petition. Such a construction would emasculate the six month limitation period in 46 U. S. C., 185).

Rule 51 has the further time requirement that the mailed notices must be sent to known claimants "not later than the day of second publication." The date of second publication in the instant case was December 12, 1949.

The District Court must have realized that there was this time requirement in Rule 51 since the only apparent purpose in requiring new publication, as that court did require, was to create a new "day of second publication" before which the mailed notices might be sent out. The District Court thus tacitly recognized, that it could not create a method of constructive service differing from that set up in the rule. The court however destroys any meaning in the word "second" if by its own order it can create a new second publication date or any number of second publication dates.

The District Court admitted:

> "*A different result would follow if there were a limitation period within which the monition and notice of monition or* notice to claimants *had to issue.* As pointed out earlier no such limitation exists" (R. 48).

(May we note parenthetically that the District Court did not point out earlier or anywhere in the opinion that no such limitation existed.)

It would seem that this court would not wish to adopt this paragraph of the District Court opinion in view of

the express time limitation in Rule 51, embraced in the words "upon" the filing of the security and "not later than the date of second publication."

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, one of the proctors for the above named appellants, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

ELMER H. GROEFSEMA.

ORDER DENYING PETITION FOR REHEARING

(Filed February 2, 1951)

The petition for rehearing is denied.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Harold H. Timanus, Admr. et al.* v. *Canada Steamship Lines, Limited*, No. 11,294, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 16th day of March, A.D. 1951.

J. W. Menzies,
Clerk of the United States Court of Appeals for the Sixth Circuit.

(seal)